99TH CONGRESS
2d Session

SENATE

EXEC. REPT.
99-20

U.N. CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS

SEPTEMBER 18 (legislative day, SEPTEMBER 15), 1986.—Ordered to be printed

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Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 98-9]

The Committee on Foreign Relations, to which was referred the United Nations Convention on Contracts for the International Sale of Goods, adopted by a United Nations Conference of Sixty-Two States on April 11, 1980, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The purpose of the Convention is to set out basic rules to govern international commercial contracts in the absence of express contractual provisions to the contrary.

SUMMARY

This Convention was adopted at a 62-nation U.N. Conference in 1980 after twelve years of preparatory work by the U.N. Commission on International Trade Law. It represents the culmination of about 50 years of international efforts to unify the law of international sales. It offers agreed substantive rules to govern the formation of international sales contracts and the rights and obligations of the buyer and seller that are in many respects similar to the concepts and approach of the U.S. Uniform Commercial Code. The Convention applies to international sales contracts only if the parties do not specify that a national law applies; moreover, the parties are free in their contract to derogate from the Convention's provisions. The Convention applies only to commercial transactions; it does not affect in any way the law with respect to purchases by consumers.

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Committee Action

The Committee held a hearing on the Convention during the 98th Congress. A second hearing was held June 11, 1986. Administration witnesses and representatives of the private sector appeared at both hearings. On September 9th the Committee ordered reported favorably the resolution of ratification by a vote of 15–0. Voting in the affirmative were Senators Lugar, Helms, Mathias, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Zorinsky, Dodd, Eagleton and Kerry.

Section-by-Section Analysis

The Department of State furnished the Committee with a section-by-section analysis:

Structure of the Convention

The uniform rules for sales transactions appear in Parts I–III of the Convention. Part I (Arts. 1–13) defines the Convention's field of application and includes other general provisions. Part II (Arts. 14–24) governs formation of the contract. Part III (Arts. 25–88) governs the rights and obligations of the parties to the contract of sale. Part IV ("Final Provisions": Arts. 89–101) establishes procedures for implementing the Convention and sets out the reservations that a State may make.

Part I: Sphere of Application and General Provisions

(Articles 1–13)

INTRODUCTION TO PART I OF THE CONVENTION

Part I sets forth rules that apply throughout the Convention. Chapter I defines the Convention's field of application. Chapter II addresses other general questions, notably interpretation of the Convention and the sales contract.

A. The Convention's Field of Application: Chapter I

Article 1 addresses two issues that control the applicability of the Convention: (1) When is a sale "international"? and (2) What contact between the sales transaction and a Contracting State will invoke the Convention? (A "Contracting State" is a country that has become a party to the Convention.) Articles 2 and 3 exclude specified types of

commodities and transactions. Articles 4 and 5 draw the line between *issues* that are regulated and those that are excluded: the excluded issues include the validity of the contract, the effect of the contract on the ownership rights of third persons (Art. 4) and liability for death or personal injury (Art. 5). The chapter closes with a brief but important provision (Art. 6) yielding overriding effect to the contract made by the parties.

CHAPTER I. SPHERE OF APPLICATION

(Articles 1–6)

Article 1. Basic rules on Applicability

Under Article 1 the Convention will apply only if two requirements are met: (1) the seller and the buyer have their "places of business in different States," and (2) both of these States are Contracting States (i.e. States that have adopted the Convention). This simplified basis for applicability reflects a recommendation that the United States ratify subject to a declaration authorized by Article 95; the reasons for making this declaration and its effect are set forth in Appendix B. Thus, an American court would apply the Convention only to sales with an international character between parties in whose countries the Convention is in force.

Article 2. Exclusions from the Convention

Article 2 provides for six exclusions from the Convention. Three (paragraphs (a)–(c)) are based on the nature of the transaction and three (paragraphs (d)–(f)) are based on the nature of the goods.

Paragraph (a) excludes substantially all consumer purchases by language based on the Uniform Commercial Code (UCC 9–109(1)). The principal impact of the Convention is thus on commercial sales between persons in business.

The remaining five exclusions do not call for discussion in this analysis.

Article 3. Goods to be Manufactured: Services

Paragraph (1) makes it clear that a sale is not excluded from the scope of the Convention merely because it calls for the manufacture or production of goods. On the other hand, it also makes it clear that the Convention does not extend to transactions in which the party receiving a finished product supplies "a substantial part" of the necessary materials.

Paragraph (2) excludes "service" contracts, in which the "supply of labour or other services" comprises the preponderant part of the transaction.

Article 4. Issues Covered and Excluded; Validity; Effect on Property Interests of Third Persons

While Articles 1–3 identify the *contracts* that are subject to the Convention, Article 4 defines the *issues* to which the Convention applies.

Article 4 states that the Convention "governs only" the following: (1) "the formation of the contract" (Part II of the Convention) and (2) "the rights and obligations of the seller and the buyer arising from such a contract" (Part III of the Convention). In addition it excludes from the Convention issues with respect to "the validity of the contract or of any of its provisions or of any usage". One example is a rule of national law that prohibits the sale of specified products, such as heroin, and invalidates contracts relating to such illegal sales.

Article 4 also provides that the Convention "is not concerned with . . . the effect which the contract may have on the property in the goods sold". Whether the sale to the buyer cuts off outstanding property interests of third persons is not dealt with by the Convention. This specific provision illustrates the general rule of Article 4 that the Convention is concerned only with the "rights and obligations of *the seller and the buyer*" arising from the sales contract. For the buyer's right, *as against the seller*, to receive good title, see Articles 41–43, *infra*.

Article 5. Exclusion of Liability for Death or Personal Injury; "Product Liability"

Article 5 makes the Convention inapplicable to the liability of the seller for death or personal injury caused by the goods. This was done lest the Convention collide with rules of national law on product liability.

Article 6. The Contract and the Convention

The dominant theme of the Convention is the primacy of the contract. See, *e.g.*, Arts. 4 and 35. Of the many provisions that develop this theme, Article 6 is the most important. Thus, the parties may exclude the Convention or "vary the effect" of any of its provisions. The breadth of the parties' freedom to contract is emphasized by the one exception stated in Article 6—the privilege of an adhering State under Articles 12 and 96 to preserve its domestic rules that require a writing. (See Art. 12, *infra*).

CHAPTER II. GENERAL PROVISIONS

(Articles 7–13)

Article 7. Interpretation of the Convention

A. International Character; Uniformity; Good Faith

Paragraph (1) provides that in interpreting the Convention there shall be regard for two closely-related principles—(a) the Convention's "international character" and (b) "the need to promote uniformity in its application." The latter provision is usual in uniform legislation in the United States. *See* UCC 1–102(2)(c). Paragraph (1) also provides that in interpreting the Convention there shall be regard for promoting "the observance of good faith in international trade." The Uniform Commercial Code states a "good faith" requirement that is broader than the principle of interpretation stated in the Convention. *See* UCC 1–203: "Every contract or duty within this

Act impose a duty of good faith in its performance or enforcement." See also: UCC 2–103(1)(b).

B. "General Principles"

Paragraph (2) provides that, where possible, questions "are to be settled in conformity with the general principles on which [the Convention] is based"—an approach that was designed to strengthen uniform international interpretation of the Convention. A somewhat similar principle is expressed in the Uniform Commercial Code. For example, section 1–102(1) states that the UCC is to be "liberally construed and applied to promote its *underlying purposes and policies.*"

Article 8. Interpretation of Statements or Other Conduct of a Party

While Article 7 deals with interpretation of the *Convention*, the present Article deals with the interpretation of the statements and conduct of the *parties*, including the provisions of the contract of sale. When there is no common "intent" of the parties, Articles 8(2) applies the objective standard familiar to the common law.

Article 8(3) authorizes "due consideration" of conduct subsequent to the agreement as this may shed light on the intentions and expectations of the parties. Similarly, the Uniform Commercial Code states that in some circumstances a "course of performance accepted or acquiesced in without objection shall be relevant to determine the meaning of the agreement" (UCC 2–208). See also UCC 2–207(3) under which "conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale . . ."

Article 9. Practices of the Parties; Trade Usages

One of the important features of the Convention is the legal effect it gives to practices of the parties and to commercial usages.

(1) Practices Established Between the Two Parties

Expectations that have the force of contract can be established by the parties' patterns of behavior. Under Article 9(1) the parties are bound by the "practices which they have established between themselves." The Uniform Commercial Code also gives contractual effect to the "course of dealing between parties"—defined as "a sequence of previous conduct between the parties to a particular transaction which is fairly to be regarded as establishing a common basis of understanding for interpreting their expressions and other conduct." (UCC 1–205)

(2) Usages of Trade

Article 9(2) provides that the agreement embraces a party's expectation that the other party will observe the usages of their trade. Unless the parties have agreed otherwise, effect is given to a trade usage "of which the parties knew or ought to have known" and which "in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." The Uniform Commercial Code also gives contractual effect to a "usage of trade"—defined as "any practice or method of dealing having such regularity of observance in a place, vocation or trade as

to justify an expectation that it will be observed with respect to the transaction in question." (UCC 1–205)

Under Article 6, "The parties may . . . derogate from or vary the effect" of the provisions of the Convention, and applicable usage has the same effect as a provision of a sales contract. In short, the provisions of the Convention yield to the expectations of the parties, whether derived from express contract terms, from their established practices or from applicable trade usage.

Article 10. Definition of "Place of Business"

The Convention refers to a party's "place of business" in several articles: 1, 12, 20(2), 24, 31(c), 42(1)(b), 57(1)(a), 69(2) and 96. If a commercial enterprise maintains a central office and one or more branch offices, Article 10 makes applicable the place of business "which has the closest relationship to the contract and its performance. . . ."

Article 11. Inapplicability of Domestic Requirement that Contract be in Writing

A. Domestic Rules: "Statutes of Frauds"

In 1677 the English Parliament (29 Car. II, c.3) enacted a Statute of Frauds which required a signed writing for the enforcement of a wide variety of transactions, including the sale of goods. This requirement was embodied in the United Kingdom's Sale of Goods Act (1893), was closely followed in the (U.S.A.) Uniform Sales Act (1896), and former the basis for an elaborate statute of frauds included in the Uniform Commercial Code (§ 2–201). In recent decades, however, the tide has been running against such formal requirements. In 1954 Britain repealed this part of the Sale of Goods Act—a step that has been followed by many of the other countries that had adopted this Act. Most civil law countries do not impose such formal requirements for the making of commercial contracts. Formal requirements have generated litigation and uncertainty, and are generally regarded to be of doubtful value for international trade.

B. The Convention

The 1980 Convention rejects such formal requirements (Article 11). This does not, however, bar the parties from imposing formal requirements. An offeror may require that an acceptance be in writing; an oral "acceptance" is not an "assent" to the offer. (See Arts. 18 and 19, *infra.*) In addition, pursuant to Article 29, *infra*, the parties by a contract in writing may require "any modification or termination by agreement" to be in writing.

A Contracting State may protect its formal requirements from Article 11 by making a reservation under Article 96. *See* Article 12, *infra.*

Article 12. Declaration by Contracting State Preserving Its Domestic Requirements as to Form

Laws of the U.S.S.R. impose strict formal requirements for the making of foreign trade contracts. In the UNCITRAL proceedings, delegates of the U.S.S.R. indicated that preserving these requirements was of great importance to protect its established patterns for the

making of foreign trade contracts. Most delegates, however, including the United States, concluded that formal requirements were inconsistent with modern commercial practice—particularly in view of the speed and informality that characterized many transactions in a market economy.

The result was a compromise. In Part IV (Final Provisions), Article 96 authorizes a Contracting State "whose legislation requires contracts of sale to be concluded in or evidenced by writing" to make a "declaration" that Article 11 (and certain other provisions of the Convention affecting formal requirements) "does not apply where any party has his place of business in that State." Article 12 articulates the effect of a declaration under Article 96. A declaration (reservation) under Article 96 would not ensure that the formal requirements of the declaring State would apply to transactions involving its buyers and sellers. Such applicability would result only when conflicts rules point to the formal requirements of the declaring State. However, conflicts rules may point to foreign law, which may have no formal requirements or may impose formal requirements that are unfamiliar to traders in the declaring State. These considerations explain why it is not recommended that the United States make a declaration pursuant to Article 96.

Article 13. Telegram and Telex as a "Writing"

This provision does not call for discussion.

Part II: Formation of the Contract

(Articles 14–24)

Introduction to Part II of the Convention

A. Relation Between Part II and other Parts of the Convention

Part II of the Convention, Formation of the Contract, is subject to the rules of Part I (Arts. 1–13) on the scope and interpretation of the Convention, but is independent of Part III (Arts. 25–88) which deals with the obligations of the parties to the contract. Article 92 (Part IV) permits a Contracting State to declare that it will not be bound either by Part II or by Part III.

B. Structure of Part II

The first four articles (14–17) deal with the offer—the minimum criteria for an offer (Art. 14), and the withdrawal (Art. 15), revocation (Art. 16) or termination (Art. 17) of an offer. The next five articles (18–22) deal with acceptance—"acceptances" that do not match the offer (Art. 19), the period allowed for acceptance (Arts. 20 and 21), and withdrawal of an acceptance (Art. 22). The two final articles (Arts. 23 and 24) relate to the time when a contract is concluded.

Article 14. Criteria for an Offer

(1) "Public Offers"

Article 14 incorporates the generally accepted premise that a person may make an offer to as large a group as he wishes. However, a com-

munication addressed to a large group, if construed as an offer, can involve practical difficulties and hazards. These practical considerations are reflected in Article 14(2): If a proposal is not "addressed to *one or more specific persons*," it is not an offer "unless the contrary is clearly indicated by the person making the proposal." See Restatement Second of Contracts § 29.

(*2*) *Definiteness: Unstated Price*

Difficult problems arise when the parties neither fix the price, expressly or implicitly, nor agree on a method for fixing the price. The Convention's solution calls for construing Article 14(1) in the light of Article 55, which states that in the above circumstances the parties are considered, in the absence of any indication to the contrary, to have impliedly made reference to the price generally charged for such goods at the time of the conclusion of the contract. The Uniform Commercial Code (§ 2–305) similarly provides that the parties "if they so intend can conclude a contract for sale even though the price is not settled."

Article 15. When Offer Becomes Effective; Prior Withdrawal

Under Article 15 an offeror may withdraw an offer by a communication that reaches the offeree ahead of the offer. The reason supporting Article 15 is that the enforcement of contracts is designed to protect expectations; none can arise until the offer reaches the offeree. *Cf.* Article 18(2), *infra.*

Article 16. Revocability of Offer

Article 16 limits the powers of an offeror to revoke an offer which the offeror has stated or indicated will be "firm" or irrevocable, or on which the offeree has reasonably relied. Compare the provisions giving effect to "firm" offers in the Uniform Commercial Code (UCC 2–205). See Restatement Second of Contracts § 87 and Illustration 6.

Article 17. Rejection of Offer Followed by Acceptance

Under Article 17, an offeree may not accept an offer which he has rejected. The same rule is applied in the United States. See Restatement Second of Contracts § 38.

Article 18. Acceptance: Time and Manner for Indicating Assent

Article 18 states how an offer may be accepted. Its most significant provision is in paragraph (3): under some circumstances, an offeree may accept an offer by performing an act requested by the offeror, such as dispatch of the goods. For a similar rule see Section 2–206(1)(b) of the Uniform Commercial Code.

Article 19. "Acceptance" With Modifications

Article 19 faces the situation in which a reply to an offer purports to be an acceptance but contains modifications of the offer. This situation most commonly results from the routine exchange of the buyer's printed purchase order and the seller's printed acknowledgement of

sale form. Under the Convention, no contract results from such an exchange if the purported acceptance contains additional or different terms that materially alter the offer. A list of examples of material alterations makes it clear that most alterations are material. However, an acceptance with an immaterial modification will be effective unless the offeror objects.

The Convention's approach to this difficult problem differs from that of the Uniform Commercial Code, under which even a material alteration may not prevent the purported acceptance from creating a contract (UCC 2–207). The Convention would thus avoid many of the problems that have arisen under and resulted in criticism of the Code provision.

Articles 20–24

The following articles dealing with various aspects of acceptance do not call for discussion:

Article 20. Interpretation of Offeror's Time-Limits for Acceptance

Article 21. Late Acceptances: Response by Offeror

Article 22. Withdrawal of Acceptance

Article 23. Effect of Acceptance; Time of Conclusion of Contracts

Article 24. When Communication "Reaches" the Addressee

These articles complete Part II: Formation of Contract.

Part III: Sale of Goods

(Articles 25–88)

Introduction to Part III of the Convention

When an enforceable international sales contract has been formed, Part III governs the rights and obligations of the seller and buyer.

Part III has five chapters. Chapter I (Arts. 25–29) contains general provisions that are applicable throughout Part III of the Convention. Chapter II (Arts. 30–52) deals with the obligations of the seller (Secs. I & II) and remedies for the seller's breach (Sec. III). Chapter III (Arts. 53–65), paralleling the structure of Chapter II, states the obligations of the buyer (Secs. I and II) and remedies for the buyer's breach (Sec. III). Chapter IV (Arts. 66–70) is devoted to risk of loss. Chapter V (Arts. 71–88) addresses anticipatory breach (Sec. I), damage measurement and interest (Secs. II & III), excuses ("exemptions") based on serious impediments (Sec. IV), effects of avoidance (Sec. V), and duties to preserve goods that face loss or deterioration (Sec. VI).

(Articles 25–29)

Article 25. Definition of "Fundamental Breach"

A. Introduction

The breach of a sales contract by one party gives the other party a right to recover damages, but Article 25 relates to other remedies—the buyer s right to reject goods and the seller's right to refuse to deliver. In domestic law these remedies may be called "rejection", "revocation of acceptance", "avoidance", "termination" or "cancellation". In the Convention (Arts. 49 & 64) a party's privilege not to perform the contract because of the other party's breach is called "avoidance of the contract."

In the Convention, as in our legal system, "avoidance" is not available for every breach. Under Articles 49(1)(a) and 64(1)(a), *infra*, a party may avoid the contract when the other party commits a "fundamental breach"—a term that is defined in Article 25.

The role played by "fundamental breach" under the Convention is similar to that played by Section 2–608 of the Uniform Commercial Code, under which a buyer who has accepted goods that turn out to be defective may revoke his acceptance if the non-conforimty "*substantially* impairs" the value of the goods to him (UCC 2–612, but *cf.* 2–601). The UCC does not attempt to define "substantial" impairment. The Convention's definition of "fundamental breach" also allows leeway to consider whether avoidance is needed to assure full protection for the aggrieved party.

Article 26. Notice of Avoidance

Article 26 provides that a "declaration of avoidance of the contract is effective only if made by notice to the other party". This is one of the significant advances of the 1980 Convention over the 1968 Hague Convention on Sales (ULIS).

At various points ULIS gave an injured party a remedy called "*ipso facto* avoidance". This type of avoidance occurred automatically with no need to notify the other party (ULIS 25, 26(1)). Consequently, the other party might be led to perform in ignorance of the injured party's decision to refuse performance. At the 1964 Hague Conference the delegations of the United States and other states attempted unsuccessfully to eliminate *ipso facto* avoidance.

In the UNCITRAL proceedings, the delegations of the United States and other countries were able to remove the doctrine of *ipso facto* avoidance, resulting in the simple rule of Article 26. Requiring that notice be given of a remedy as drastic as avoidance is consistent with the Uniform Commercial Code. See UCC 2–602(1) (notice of rejection), 2–608(2) (notice of revocation of acceptance).

Article 27. Delay or Error in Communications

Under Article 26, *supra*, avoidance of a contract is effected "by notice" and in other settings communications have important consequences. *E.g.* Arts. 39(1) (notice of lack of conformity) and 43 (notice of right or claim of third party). Article 27 addresses the problems that arise when a notice is sent but, because of a mishap in transmission, is delayed, garbled or lost. Article 27 lays down the general rule that a party satisfies his duty to notify if he dispatches the communication "by means appropriate in the circumstances."

This general rule is subject to exceptions in Articles 47(2), 48(4), 63(2), 65(1) & (2) and 79(4). Nearly all of these exceptions involve a communication by a party who is in breach of contract; the "receipt" principle was used so that a mishap in transmission would not add to the burdens of the aggrieved party.

The Uniform Commercial Code similarly requires the buyer to "notify" the seller of breach or "be barred from any remedy", and provides that one "notifies" another "*by taking such steps* as may be reasonably required to inform the other in ordinary course whether or not such other actually comes to know of it" (UCC 2–607(3) and 1–201(26)). The UCC, like the Convention, states exceptions from this general rule (e.g. § 2–616).

Article 28. Specific Performance and the Rules of the Forum

The Convention's system of remedies for breach of contract is based on the premise that a party in breach may be compelled to perform his obligations. On the other hand, restrictions on the right to specific performance appear in Articles 46(2) and 46(3).

Even with the restrictions just mentioned, the Convention grants specific performance on a wider scale than does the common law. As a concession to the common law, Article 28 provides that rules of national law withholding specific performance will prevail over the rules of the Convention. Thus, courts in the United States would still be subject to the limits on such remedies provided in Section 2–716 of the Uniform Commercial Code. *Cf.* UCC 2–709.

Article 29. Modification of Contract; Requirement of a Writing

Sales contracts sometimes provide that they may be modified only in writing. Article 29 gives effect to these private "statutes of frauds". The Uniform Commercial Code is similar (UCC 2–209(2)).

CHAPTER II. OBLIGATIONS OF THE SELLER

(Articles 30–52)

Introduction to Chapter II

Chapter II opens with a brief statement giving the essence of the seller's obligations (Art. 30). The remaining articles of the Chapter are grouped in three sections. Two sections define the seller's most

important duties: The time and place for delivering the goods (Sec. I, Arts. 31–34); the quality of the goods and their freedom from third party claims (Sec. II, Arts. 35–44). The final section sets forth the basic remedies that are given to the buyer when the seller fails to perform his duties under the contract (Sec. III, Arts. 45–52).

The brief summary of Chapter II in Article 30 does not call for further discussion.

SECTION I: DELIVERY OF THE GOODS AND HANDING OVER THE DOCUMENTS

(Articles 31–34)

Article 31. Place for Delivery

When the contract, interpreted in the light of practices and usages, does not state where the seller should deliver the goods, the place of delivery is determined by Article 31. See also the Convention's rules on risk of loss in Article 67 and 69, *Infra.*

Article 32. Shipping Arrangement

In international sales, the seller usually completes his obligation to deliver by "handing over the goods to the first carrier for transmission to the buyer." Art. 31, *supra*, and Article 67, *infra*. However, the seller also normally makes various arrangements with respect to carriage. Any provision of the sales contract (including usage and any practice between the parties) is decisive as to the seller's obligations in this regard; to the extent that there is no agreement with respect to shipping arrangements. Article 32 fills the gap.

Paragraph (1), requiring the seller to notify the buyer of the shipment, is similar to Section 2–504(c) of the Uniform Commercial Code. Paragraph (2), dealing with transportation arrangements, is similar to UCC 2–504. Paragraph (3) calls for cooperation between the parties with respect to supplying needed information concerning insurance. Similar rules on co-operation are set forth in the Uniform Commercial Code (2–311, 2–319(1)(c) and 2–319(3)).

Article 33. Time for Delivery

This article does not call for discussion.

Article 34. Documents relating to the Goods

Article 34 responds to commercial practice in international sales that permits, and often requires, delivery of the goods to be effected by handing over documents (such as a bill of lading) that control the goods. Accord: UCC 2–310(b). *Cf.* UCC 2–505 and 2–507(2).

Article 34 also provides that the seller's right to "cure" a defective delivery of goods (Art. 37, *infra*) extend to the delivery of documents. The Uniform Commercial Code provides that a seller may cure a "tender or delivery," which may include the tender of documents (2–508(1); 2–504(b)).

SECTION II. CONFORMITY OF THE GOODS AND THE THIRD PARTY CLAIMS

(Articles 35–44)

Introduction to Section II

Articles 35 and 36 define the seller's obligations with respect to the quality of the goods. Articles 37–40 describe procedures that apply when goods are defective—the seller's privilege to cure defects in the goods (Art. 37) and the buyer's obligation to examine the goods and notify the seller of nonconformity (Arts. 38–40). Articles 41 and 42 define the rights of the buyer when the goods are subject to third party claims of ownership (Art. 41) and of rights based on patents, trademarks or other types of intellectual property (Art. 42). Article 43 requires the buyer to notify the seller of these claims; the concluding article (Art. 44) gives grounds for excusing a failure to notify the seller.

Article 35. Conformity of the Goods

Paragraph (1) of Article 35 emphasizes that the seller must supply goods of the quality provided in the contract. As mentioned earlier (Art. 9, *supra*) under the Convention the practices established by the parties and applicable trade usages help to determine the contractual obligations of the parties. Accord: UCC 1–205. The Uniform Commercial Code also emphasizes the importance of the contract. (UCC 2–313).

Paragraph (2) of Article 35, like Sections 2–314 and 2–315 of the Uniform Commercial Code, gives effect to the buyer's basic expectations of quality. Paragraph 2(a), on fitness of goods for "the purposes for which goods of the same *description* would *ordinarily* be used," is similar to UCC–2–314(2)(c). Paragraph 2(b), on fitness for a particular purpose, is similar to UCC 2–315. Paragraph (2)(c), on conformity with a sample or model, is similar to UCC 2–313(1)(c). Paragraph (2)(d), on packaging, is similar to UCC 2–314(2)(e). Paragraph (3), on the effect of the buyer's knowledge of a lack of conformity, is comparable to UCC 2–316(3)(b).

Article 36. Damage to Goods: Effect on Conformity

Goods often arrive in poor condition because of damage that occurred after the risk of loss passed to the buyer. Paragraph (1) of Article 36 makes it clear that the seller is not responsible for defects that result from transit casualties which the buyer has assumed under the contract or under the Convention's rules on risk of loss (Arts. 66–70, *infra*). Paragraph (2) deals with the effect of contractual guarantees that goods will retain a specified quality for a prescribed period of time.

Article 37. Right to Cure Up to the Date for Delivery

Under Article 37 the seller, up to the agreed date for delivery, may remedy defects in the goods and thereby prevent destruction of the contract by "avoidance"—the remedy that in U.S. law is termed "rejec-

tion" (UCC 2-601) or "revocation of acceptance" (UCC 2-608). The "cure" provisions of Article 37 closely resemble those of UCC 2-508(1). *Cf.* Art. 48, *infra*, and UCC 2-508(2).

Article 38. Time for Examining the Goods

Article 38 provides rules on how soon the buyer "must examine" the goods. These rules are given legal effect by Article 39(1), which cuts off the buyer's rights if he fails to notify the seller of a nonconformity within a reasonable time after he "ought to have discovered" it. The rules on inspection and notice in Articles 38 and 39(1) are similar to the notice requirement in UCC 2-607(3)).

Article 39. Notice of Lack of Conformity

Article 40. Seller's Knowledge of Non-Conformity

Article 44. Excuse for Failure to Notify

As was mentioned under Article 38, the notice requirement of Article 39(1) is similar to that of UCC 2-607(3). However, Article 39(2) sets an outer limit for notice of two years unless the parties agree otherwise; the UCC states no fixed outer limit for notification. *Cf.* UCC 2-725 (limitation period for actions of four years after delivery). On the other hand, the Uniform Commercial Code extends to claims, including those for personal injury arising out of consumer purchases, where substantial delays in notification may be justified. As we have already seen, the Convention excludes substantially all consumer transactions (Art. 2(a)) and excludes all claims for death or personal injury (Art. 5). Article 44 of the Convention relaxes the notice requirement of Articles 39(1) and 43(1) to the extent of allowing the buyer to reduce the price (Art. 50) "or claim damages, except for loss of profit" when the buyer "has a reasonable excuse for his failure to give the required notice." This provision, however, does not remove the two-year outer limit for notification set by Article 39(2) or authorize a buyer, who has failed to give notice within a reasonable time, to exercise other remedies such as avoidance of the contract (Art. 49, *cf.* Art. 46).

Article 41. Third-Party Ownership Claims to Goods

Article 42. Third-Party Claims Based on Patent or Other Intellectual Property

Article 43. Notice of Claim

One of the limits on the scope of the Convention is set by Article 4: "this Convention . . . is not concerned with . . . (b) the effect which the contract may have on the property in the goods sold". Thus, if a third person claims the goods because of a defect in the seller's title, the question whether the buyer is protected, as a good faith purchaser, against that third-party claim is not governed by the Convention but is left to applicable domestic law.

Article 41 addresses this question: When the seller supplies goods that are subject to a third-party claim, what are the rights of the buyer *against the seller*? Third-party claims "based on industrial property or other intellectual property" (e.g., a patent or copyright) are dealt with in Article 42.

The protection afforded the buyer under Article 41 is similar to the implied warranty of title provided by the Uniform Commercial Code (UCC 2–312(1)). The Code gives the buyer rights against the seller when a third person establishes a claim "by way of infringement or the like" (UCC 2–312(3)), but does not deal with the problems that arise when the buyer encounters an infringement claim in a country where the seller could not have anticipated that the goods would be used or resold. These problems are addressed in Article 42.

The notice provisions of Article 43 do not call for discussion here. *Cf.* Articles 39, 40 and 44, *supra*. (Article 43 does not set a fixed cut-off period for notice comparable to the two-year period in Article 39(2)).

SECTION III. REMEDIES FOR BREACH OF CONTRACT BY THE SELLER

(Articles 45–52)

Introduction to Section III

A. A Bird's-Eye View of the Section

The first two sections of Chapter II define the seller's duties; Section III defines the buyer's remedies when the seller is in breach.

Section III opens (Art. 45) with a general overview of the remedial system and indicates the relationship of different remedies to each other. *Cf.* UCC 2–711, 2–720. Article 46 states the buyer's right to compel performance by the seller. See Art. 28, *supra*, and UCC 2–716.

Three articles (Arts. 47–49) address the buyer's right to "avoid" the contract, a concept that includes the rejection of goods. *Cf.* UCC 2–601, 2–608. Article 47 empowers the buyer to fix an additional final period for the seller's delivery of the goods—a step that clarifies the buyer's right to avoid the contract for delay in delivery. Article 48 empowers the seller to "cure" defects in performance and thus forestall avoidance of the contract. *Cf.* UCC 2–508. Article 49 states the grounds on which the buyer may avoid the contract. *Cf.* UCC 2–608.

The section closes with three articles dealing with special situations—the buyer's right to reduce the price (Art. 50), the applicability of remedies to only part of the goods (Art. 51; *cf.* UCC 2–601(c), 2–608(1)) and deliveries that are too early or excessive in quantity (Art. 52; *cf.* UCC 2–601(c)). Although the remedy in Article 50 (reduction of price) has its origin in civil law concepts, its formula has been amended so as to approximate the common law right to deduct damages from the price (*Cf.* UCC 2–717).

B. Relationship to Other Parts of the Convention

Section III of the present chapter provides remedies that apply only to breach by the seller; Section III of Chapter III provides comparable remedies for breach by the buyer. These two sections are supplemented by remedial provisions in Chapter V that apply to both parties—*e.g.*, anticipatory breach (Sec. I), the measurement of dam-

ages, and interest (Secs. II and III), "exemption" from damages (Sec. IV) and the effects of avoidance of the contract (Sec. V).

C. General Comment

It is not feasible for this legal analysis to analyze in detail the remedial provisions of Articles 45–52. It must suffice to note that, with the encouragement of the United States delegation, UNCITRAL reviewed the 1964 Hague Convention (ULIS), unified and simplified its complex provisions, and thereby met the serious objections of the United States delegation to the 1964 Hague Conference.

CHAPTER III: OBLIGATIONS OF THE BUYER

(Articles 53–65)

Introduction to Chapter III

The structure of Chapter III is similar to that of the preceding chapter on Obligations of the Seller. Two sections state the buyer's duties: to pay the price (Sec. I, Arts. 53–59; *cf.* UCC 2–310(a), 2–507 (1)) and to take delivery (Sec. II, Art. 60). The final section defines the remedies that are available to the seller when the buyer fails to perform these duties (Sec. III, Arts. 61–65; *cf.* UCC 2–703). These remedial provisions (like those in Chapter II) are supplemented by general rules on remedies in Chapter V (Arts. 71–88).

Many of the provisions of this chapter on the obligations of the buyer are mirror-images of provisions in the preceding chapter on the obligations of the seller.

CHAPTER IV: PASSING OF RISK

(Articles 66–70)

Introduction to Chapter IV

Casualty to the goods (*e.g.* by theft or fire) may occur in various settings—while the seller holds the goods before delivering them to a carrier or to the buyer, while the goods are in transit, while the buyer is examining the goods, or while the buyer holds the goods after rejecting them. Usually the loss will be covered by insurance. Allocating the risk of loss between seller and buyer should reflect considerations such as these: Which party is in a better position to evaluate the loss and press a claim against the insurer and to salvage or dispose of damaged goods? Who can insure the goods at the least cost? Who is more likely to carry insurance under standard commercial practice? What rules on risk will minimize litigation over negligence in the care and custody of the goods?

The United States delegates to the 1964 Hague Conference on Sales reported their disappointment that risk of loss was governed by concepts that were so abstract that results were unpredictable and unresponsive to commercial needs. In UNCITRAL, on the initiative of the United States and other delegations, these objections were met by a thorough overhaul of these rules. As a result, the 1980 Convention

speaks of physical acts of transfers of possession—the "handing over" of the goods to a carrier or to the buyer.

Article 67 deals with the important issue of risk of loss in transit. When the contract (including the parties' established practices—Art. 9) does not solve this problem, the Convention, like the Uniform Commercial Code, provides the general rule that risk passes to the buyer when the goods are handed over to the carrier. Article 67 also echoes the Code in providing that the seller's retention of "documents controlling the disposition of the goods does not affect the passage of the risk." (See UCC 2-509(1)(a)).

Article 68 deals with contracts for the sale of goods that are already in transit when the contract is made, and provides that risk passes at the making of the contract unless the parties otherwise agree or the circumstances indicate an earlier time. The Uniform Commercial Code does not address this problem.

Article 69 deals, among other matters, with non-transit situations, and makes risk pass to the buyer ' when he takes over the goods"—an approach that is similar to UCC 2-509(3). Finally, Articles 69(1) and 70 deal with the effect of breach of contract on risk; in both approach and result these articles are similar to the Uniform Commercial Code (UCC 2-510).

CHAPTER V. PROVISIONS COMMON TO THE OBLIGATIONS OF THE SELLER AND OF THE BUYER

(Articles 71–88)

This concluding chapter addresses special problems with respect to remedies for breach of contract. Section I, Anticipatory Breach and Installment Contracts (Arts. 71–73), is concerned primarily with protection against impending failure of counter-performance; a party who faces this problem may, in some circumstances, suspend performance (Art. 71; *cf.* UCC 2-609, 2-705) or avoid the contract (Art. 72; *cf.* UCC 2-610). Article 73 deals with similar problems that arise in contracts for the delivery of goods by installments (*Cf.* UCC 2-612). Section II (Arts. 74–77) provides rules for measuring damages. (*Cf.* UCC 2-706—2-710, 2-712 to 2-715, 2-723). Section III consists of a brief provision Art. 78) allowing the recovery of interest on sums in arrears. Section IV, exemptions (Arts. 79–80), confronts the difficult question of excuse from liability when performance is prevented by an impediment (*e.g.*, *force majeure*). (*Cf.* UCC 2-613, 2-615). Section V, Effects of Avoidance (Arts. 81–84), includes provisions on the restitution of benefits received under a contract that has been avoided. (*Cf.* UCC 2-711 (1) & (3)). Section VI, Preservation of the Goods (Arts. 85–88), is designed to prevent the waste or deterioration of goods that have been rejected. (*Cf.* UCC 2-602(2)(b), 2-603, 2-604).

PART IV. FINAL PROVISIONS

(Articles 89–101)

A. Introduction

Many of these provisions are ministerial. Articles 89 and 91 are administrative provisions commonly included in United Nations conventions. Article 90 deals with the relationship between the 1980 Conven-

tion and any other convention that "contains provisions concerning the matters governed by" the 1980 Convention. The most significant provisions in this part deal with permitted reservations and the Convention's entry into force.

(*1*) "*Declarations*" (*Reservations*)

Articles 92–96 specify those "declarations" (reservations) that may be made by Contracting States to modify their obligations under the Convention.

Article 92 permits a Contracting State to declare that it will not be bound by Part II (Formation of the Contract) or by Part III (Obligations of the Parties under a Contract of Sale). At the 1964 Hague Conference, contrary to the position urged by the United States, separate conventions were adopted on formation of the sales contract and on obligations under the contract. In UNCITRAL, the United States position was accepted. Because of the relationship between Parts II and III, it seems advisable for the United States to ratify the entire Convention without a declaration under Article 92.

Article 93 is designed to permit a declaration (reservation) by a Contracting State with a constitutional system different from the United States (e.g. Canada) that embraces territorial units in which "different systems of law are applicable in relation to the matters dealt with" in the Convention. As already indicated, the Convention applies only to international sales. In view of the Constitutional power of the United States federal government over foreign commerce (Constitution Art. I § 8) and the treaty power (Constitution Art. II § 2; Art. VI), a declaration by the United States pursuant to Article 93 would be unnecessary and inappropriate. In the absence of a United States declaration, the Convention will extend to all territories under the jurisdiction of the United States.

Article 94 seeks to meet the needs of States joined in economic communities (e.g. Benelux) by providing for reservations by two or more Contracting States "which have the same or closely related legal rules on matters governed by" the Convention. If two or more States make declarations under Article 94, the Convention will not apply to transactions among parties in these States but will, of course, apply to transactions that run between parties in these States and parties in other states. See Article 1, *supra*. There is no need for the United States to make use of such a reservation.

Article 95 permits a Contracting State to declare that it will not be bound by Article 1(1)(b) which would make the Convention also apply "when the rules of private international law lead to the application of the law of a Contracting State." States that make this declaration would apply the Convention only when the seller and buyer have their places of business in different *Contracting* States (Art. 1(1)(a)). As noted under Article 1, *supra*, it is recommended that the United States ratify subject to this reservation; the reasons are set forth in Appendix 9 to this analysis.

Article 96 permits a declaration by a State that wishes to protect its domestic legislation that "requires contracts of sale to be concluded in or evidenced by writing", *i.e.*, a "statute of frauds". For the reasons given in the discussion of Articles 11 and 12 of the Convention, it is considered inadvisable for the United States to make use of the reservation permitted by this Article.

(2) *Entry Into Force*

Article 99(1) provides that the Convention enters into force on the first day of the month following the expiration of twelve months after the tenth State has consented to be bound by the Convention. Article 99(2) governs the time when the Convention enters into force with respect to States whose consent to be bound follows that of the ten initial States.

Text of Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the United Nations Convention on Contracts for the International Sale of Goods, adopted by a United Nations Conference of Sixty-Two States on April 11, 1980.

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99TH CONGRESS
2d Session

SENATE

EXEC. REPT.
99-21

INTER-AMERICAN CONVENTION ON LETTERS ROGATORY, WITH PROTOCOL

SEPTEMBER 18 (legislative day, SEPTEMBER 15), 1986.—Ordered to be printed

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Mr. LUGAR, from the Committee on Foreign Relations, submitted the following

REPORT

[To accompany Treaty Doc. 98-27]

The Committee on Foreign Relations, to which was referred the Inter-American Convention on Letters Rogatory, adopted at Panama City, Panama, on January 30, 1975, together with the additional Protocol to the Convention, adopted at Montevideo, Uruguay, on May 8, 1979, and signed on behalf of the United States on April 15, 1980, having considered the same, reports favorably thereon without amendment and recommends that the Senate give its advice and consent to ratification thereof.

PURPOSE

The purpose of the Convention is to facilitate the international service of documents in civil and commercial proceedings.

SUMMARY

This Convention and Protocol establish a mechanism for the service of process and similar documents and for processing certain requests for information. Like the Hague Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil and Commercial Matters, to which the United States is a party, the present Convention should save U.S. courts and litigants significant time, effort and expense. Contracting States would designate a Central Authority to which requests for service would be transmitted; the Department of Justice is the Central Authority for purposes of the Hague Convention and will serve a similar function under this Convention and Protocol.

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Committee Action

The Committee held a hearing on the Convention on June 11th where Administration witnesses and representatives of the private bar testified. On September 9th the Committee ordered reported favorably a resolution of ratification by a vote of 15–0. Voting in the affirmative were Senators Lugar, Helms, Mathias, Boschwitz, Pressler, Murkowski, Trible, Evans, Pell, Biden, Sarbanes, Zorinsky, Dodd, Eagleton and Kerry.

Section-by-Section Analysis

The Department of State furnished the Committee the following section-by-section analysis:

The Inter-American Convention

The Convention consists of twenty-five articles.

Article 1 sets forth equivalent terms for the English "letters rogatory" in the Spanish, French and Portuguese languages. Although Spanish was the negotiating language, the Convention was concluded in all four official languages of the OAS and, as noted in Article 25, all four texts are equally authentic.

Article 2 limits the scope of the Convention to the performance of procedural acts, such as service of process, summonses or subpoenas. (The Additional Protocol in Article 1 expands the list of examples of such procedural acts to include "pleadings, motions, orders, and subpoenas"; it also provides that letters rogatory may be used to direct requests for information to a judicial or administrative authority, e.g., on the status of a ruling or case.)

The Spanish text of the Convention provides in Article 2 that letters rogatory may be issued in conjunction with civil or commercial proceedings by "órganos jurisdiccionales," a term for which no precise translation was found in the original English text. As adopted in 1975, therefore, the English text of Article 2 referred simply to proceedings before the "appropriate authority." Subsequently, to avoid misunderstandings or discrepancies in interpretation among the various Contracting States, the Department of State formally requested the Organization of American States to make a correction of the English text. Under the established procedure for rectifying textual discrepancies in treaties and conventions for which the OAS is depository, such a correction has been made and the official English text of Article 2 now refers to "judicial or other adjudicatory authorities." This terminology, which more closely equates to the meaning of the Spanish term "órganos jurisdiccionales," makes clear that not only courts but also other tribunals or authorities that have quasi-judicial or adjudicatory powers may avail themselves of the Convention by issuing letters rogatory. As discussed below, comparable corrections have also been made to the English text of the Additional Protocol.

Article 3 expressly excludes compulsory enforcement measures such as attachments, garnishments, restraining orders and other enforcement-oriented measures from the purview of the Convention. It was deemed advisable to defer consideration of such measures for a later convention.

Article 4 sets forth acceptable channels for the transmission of letters rogatory (diplomatic or consular channels; judicial channels; the Central Authority of the State of origin or of the State of destination). Although the Convention does not expressly obligate each Contracting State to designate a Central Authority, paragraph 2 of this article implies such an obligation in that it requires each Contracting State to advise the General Secretariat of the OAS of the identity of its Central Authority. (Article 2 of the Additional Protocol makes the designation of a Central Authority mandatory.)

Under the terms of the Hague Service Convention, use of the Central Authority is prescribed only for receiving and processing letters rogatory in the State of destination. The Inter-American Convention, by contrast, makes the Central Authority in the State of origin a proper channel for transmission of letters rogatory from the State of origin. (Article 1 of the Additional Protocol makes Central Authorities the primary channel of transmission.)

Articles 5, 6 and 7 obligate Contracting States to execute letters rogatory sent through the designated channels if the requisite formalities have been observed. The first formality concerns "legalization" (a series of official certifications of authenticity required for legal documents intended for use abroad). Contracting States are not required

to execute the letters rogatory unless they have been legalized. Article 5(a) refers to the customary method of legalization—the addition by a diplomatic or consular agent of the State of destination, who is accredited to the State of origin, of a seal and certification to an underlying chain of authentications. This rather cumbersome and time-consuming process of legalization is not necessary, however, when letters rogatory are transmitted through consular or diplomatic channels or through the Central Authority (Article 6). Similarly, legalization is not required for letters rogatory issued by courts in "border areas" of the Contracting States; such courts may execute letters rogatory directly (Article 7).

The second formal requirement, expressed in Article 5(b), is that both the letter rogatory and the documents appended to it be translated into the language of the State of destination. (As discussed below, Article 3 of the Additional Protocol eliminates the requirement for translation of certain of the accompanying documents.)

Article 8 specifies the documents that must accompany the letters rogatory.

Article 9 provides that service of documents under the Convention does not commit the State of destination to recognize or enforce any ensuing judgment that may be rendered by the requesting authority. An identical rule is already codified in the Judicial Code, 28 U.S.C. 1696. Unlike the Hague Service Convention, the Inter-American Convention does not attempt to provide rules for judgments in case of default.

Article 10 states that the procedural laws and rules of the State of destination govern the execution of the letters rogatory. This article also provides that the State of destination may, if requested, execute the letter through a special procedure or accept the observance of additional formalities in effecting service, provided such procedures or formalities are not contrary to the laws of that State. The language of Article 10 is sufficiently broad to encompass in federal States both the procedural law of the central government and the procedural laws of constituent states.

Article 11 provides that the State of destination may decide any issue relating to the execution of the letter rogatory. If the authority to which a letter rogatory is addressed concludes that it lacks jurisdiction to execute it, that authority must forward the documents and a summary of the procedural history ("antecedents") to the appropriate court or authority. This rule prevents the documents from being returned to the State of origin merely because they were initially directed to the wrong authority within the receiving State.

Article 12 provides for payment of costs involved in processing and execution of letters rogatory by the interested parties. (This provision is substantially modified by Articles 5, 6 and 7 of the Additional Protocol.)

Article 13 makes it possible for consular or diplomatic agents to perform the acts referred to in Article 2 in the State to which they are accredited, provided such action is not contrary to the laws of that State. Pursuant to 22 CFR 92.85 and 92.86, however, United States diplomatic and consular officers are prohibited from serving process on behalf of private litigants, except as provided in 22 CFR 93.

Article 14 is directed towards Contracting States which belong to economic integration systems, such as the Latin American Free Trade Association or the Andean Common Market. Such States (and such other States as they may agree to include) are permitted to conclude less restrictive arrangements among themselves concerning letters rogatory. Any such arrangements will not apply to other Contracting States.

Article 15 permits Contracting States either to continue in force agreements with less restrictive provisions, or to enter into such agreements in the future. It further authorizes the continuance of practices between States concerning letters rogatory which may be less restrictive than those prescribed by the Convention. For example, service by mail or by a private process-server may continue to be employed if authorized by the law of the State of destination.

Article 16 permits Contracting States to declare that the Convention shall also apply in criminal, labor, arbitration, and "contentious-administratve" cases, as well as other matters. Only one Contracting State (Chile) has declared that it is willing to apply the Convention to such cases, and the United States does not plan to file a declaration under Article 16. For the United States, as for most other Contracting States, the Convention would thus apply only to "civil and commercial matters," as specified in Article 2.

Article 17 provides that the State of destination may refuse to execute a letter rogatory which is "manifestly contrary to its public policy." Because of its vagueness, the use of the public policy exception has been criticized in the past as offering an escape from an otherwise binding treaty obligation. A more restrictive provision would have been desirable, such as that in the Hague Service Convention which narrowed the area within which a State could refuse to honor a request for service to instances where compliance would infringe upon the requested State's "sovereignty or security." Although the Hague standard was not adopted, the framers of the Inter-American Convention intended, by insertion of the word "manifestly," to indicate that the public policy exception should be construed narrowly.

Article 18 requires Contracting States to inform the depositary (the General Secretariat of the OAS) of their requirements for legalization and translation.

Articles 19–22 and 24–25 contain standard provisions relating to signing, ratification, accession, entry into force, denunciation, and deposit of instruments of ratification. Of particular interest is Article 21, which provides that "any state" may accede to the Convention, thus permitting accession also by States that are not members of the Organization of American States.

Article 23 is a "Federal-State" clause. It allows Contracting States which have two or more political subdivisions in which different systems of law apply to declare that the Convention applies to all of its political subdivisions, or only to one or more of them.

The Additional Protocol

The Additional Protocol consists of twelve articles and an Annex.

Article 1 of the Additional Protocol provides that it shall apply only to those procedural acts set forth in Article 2(a) of the basic Convention, thereby excluding its use for the taking of evidence. The pro-

cedural acts to which the Additional Protocol applies are understood to mean pleadings, motions, orders and subpoenas, as well as requests for information addressed to a judicial or an administrative authority of a Contracting State. The Additional Protocol applies only to those requests for service or for information that are transmitted by letters rogatory between the Central Authorities of Contracting States.

As noted above in the discussion of Article 2 of the basic Convention, the text in Spanish—the language in which the Convention and Additional Protocol were negotiated—provides that letters rogatory are to be issued by "órganos jurisdiccionales." In Spanish-speaking member States of the OAS, "órangos jurisdiccionales" are understood to include not just courts but other tribunals or authorities with quasi-judicial or adjudicatory functions as well. A literal translation into English ("jurisdictional organs") would have conveyed little meaning, and as the English text was being prepared in the final sessions of the conference at which the Additional Protocol was negotiated, the term "judicial or administrative authorities" was chosen for the English version. While that formulation made it clear that the right to issue letters rogatory under the Convention was not limited to courts, it erred on the side of expansiveness; the phrase could have created future misunderstandings if it led users of the English text to infer that *any* "administrative authority" could issue letters rogatory.

At the request of the United States, this discrepancy between the Spanish and English texts has now been rectified, and the English text of the Additional Protocol, in Article 1 and subsequently, has been officially corrected to provide that letters rogatory are to be issued by "judicial or other adjudicatory authorities." From this corrected text it is thus clear that, while not all "administrative authorities" may avail themselves of the Convention mechanism for issuing letters rogatory, those which have quasi-judicial or adjudicatory functions may do so.

This provision is consistent with established United States policy on judicial assistance, embodied in P.L. 88–619, 78 Stat. 995 (1964). P.L. 88–619 added a new section 1696 to title 28, U.S. Code, to provide for service in the United States of documents issued in connection with proceedings in a "foreign or international tribunal," and amended sections 1781 and 1782 of title 28, which provide for the transmittal of letters rogatory and the provision of judicial assistance in connection with such proceedings. Use of the terminology "foreign or international tribunal" is explained in the legislative history of P.L. 88–619 as follows:

> Subsection (a) of proposed revised section 1782 also describes the foreign proceedings in connection with which U.S. judicial assistance may be granted. . . . The word "tribunal" is used to make it clear that assistance is not confined to proceedings before conventional courts. . . . In view of the constant growth of administrative and quasi-judicial proceedings all over the world, the necessity for obtaining evidence in the United States may be as impelling in proceedings before a foreign administrative tribunal or quasi-judicial agency as in proceedings before a conventional foreign court. Subsection (a) therefore provides the possibility of U.S. judicial assistance in connection with all such proceedings.

S. Rep. No. 1580, 88th Cong., 2d Sess.; H.R. Rep. No. 1052, 88th Cong., 2d Sess., *reprinted in* 1964 U.S. Code Cong. & Ad. News 3782, 3788.

Article 2 of the Additional Protocol mandates that each Contracting State designate a Central Authority at the time instruments of ratification are deposited. This clarifies the ambiguity in Article 4 of the basic Convention as to whether designation of a Central Authority is mandatory. It is contemplated that the Central Authority for the United States will be the Department of Justice, which has already been designated by Executive Order to perform that function in connection with the Hague Service Convention.

Article 3 of the Additional Protocol prescribes requirements for preparation and delivery of letters rogatory, including the use of special standardized forms—contained in the Annex to the Additional Protocol—that correspond to the forms prescribed by the Hague Service Convention. This article reduces the requirements of Article 5(b) of the basic Convention by limiting the translation requirement to the text of the letters rogatory, the notice of essential information for the addressee accompanying the letters rogatory, and the complaint or pleading that initiated the action in connection with which the letter rogatory was issued; additional documentation appended to the letters rogatory need not be translated. Contracting States with more than one official language are required to notify the General Secretariat of the OAS which language or languages shall be considered official for purposes of the Convention and Protocol.

Article 3 of the Additional Protocol also limits the authentication requirements for the documents transmitted by letters rogatory, by providing that the seal of the requesting judicial or other adjudicatory authority shall suffice.

Article 4 of the Additional Protocol sets out the procedure that the Central Authority in the State of destination is to follow after receipt of letters rogatory from the Central Authority of another Contracting State and the procedure that will be followed in certifying execution of letters rogatory in the State of destination. Letters rogatory received by the United States Central Authority (Department of Justice) will be transmitted to the U.S. Marshals Service, for service in accordance with Rule 4. Federal Rules of Civil Procedure.

Articles 5, 6, and 7 of the Additional Protocol relate to charges for services rendered in executing letters rogatory. Article 5 provides that Contracting States may not charge for processing services provided by the Central Authorities or by their judicial or administrative authorities but may seek payment for services for which, under local law, the interested parties are required to pay. Article 6 requires each Contracting State to provide the OAS General Secretariat with a fee schedule indicating the cost of such services and to specify, in addition, a single amount that it considers will reasonably cover the costs of such services. Under Article 5, a party requesting the execution of a letter rogatory may either designate a person in the State of destination who is responsible for any charges incurred, or else attach a check for the single amount referred to above or indicate that funds in that amount have otherwise been transferred to the Central Authority of the State of destination. Article 5 further provides that if the actual cost of services is greater in a specific case, that circumstance shall not delay or prevent the processing or execution of the request.

Article 7 of the Additional Protocol permits Contracting States to declare, on a reciprocal basis, that they will either render services free of charge or accept the fixed amount specified in accordance with Article 6 or another specified amount in payment for the services rendered. The Central Authority of the United States under the Hague Service Convention originally imposed a flat fee of $15.00 for execution of each request, but it subsequently modified this practice because of the resulting administrative costs, dissatisfaction expressed by other Contracting States, and the delays in processing requests when checks were inadvertently not enclosed or lost. Since 1978 the U.S.. Central Authority has not charged a fee for service of documents which it receives from any State Party to the Hague Service Convention which does not impose a charge for service of documents sent from the United States.

The United States delegation to CIDIP–II in Montevideo had strongly urged adoption of the practice of serving foreign judicial documents free of charge. The United States will declare at the time of the deposit of its instrument of ratification that the fee for service of foreign judicial documents in the United States as specified in Article 6 shall be $25.00 and that, pursuant to Article 7, service will be made free of charge on a reciprocal basis.

Articles 8–13 contain the customary closing provisions on signature, ratification, accession, deposit of instruments of ratification or accession, entry into force, denunciation, and duties of the depository authority (the General Secretariat of the OAS).

Article 8 permits adherence to the Protocol by OAS member States which are parties to the basic Convention; adherence to the Protocol alone is thus not possible. Article 8 also permits States which are not OAS members to accede to the Protocol if they accede or have acceded to the Convention.

Under the formula provided in *Article 9*, the Additional Protocol entered into force on June 14, 1980—thirty days after the date on which two States Party to the Convention had deposited instruments of ratification to the Protocol.

Article 10, the "Federal-State" clause, allows Contracting States which have two or more political subdivisions in which different systems of law apply to declare that the Protocol applies only to some of its political subdivisions.

The *Annex to the Additional Protocol* contains three forms which are required to accompany a request for service under the Convention and Additional Protocol.

Form "A" is a basic request form identifying the requesting party, counsel for the requesting party, the requesting judicial or other adjudicatory authority, the Central Authority in the State of origin, the Central Authority in the State of destination, and an indication of how costs and expenses are to be paid. This form describes the documents that are to be served or delivered and identifies the persons or authorities for whom they are intended. It also permits a request pursuant to Article 10 of the Convention for service in accordance with a special procedure or additional formalities.

Form "B", completed by the requesting authority, is addressed to the party to be served. It describes the documents to be served and their purpose and advises the recipient of the legal consequences if a required response or appearance is not made by a specified time.

Form "C", to be completed by the Central Authority of the State of destination, is a certificate of service (or non-delivery if service cannot be made) on which will be recorded the date, address and names of the individual who accepted service, or the reasons for non-delivery.

Text of Resolution of Ratification

Resolved, (two-thirds of the Senators present concurring therein), That the Senate advise and consent to the ratification of the Inter-American Convention on Letters Regatory, adopted at Panama City, Panama, on January 30, 1975, together with the additional Protocol to the Convention, adopted at Montevideo, Uruguay, on May 8, 1979 and signed on behalf of the United States on April 15, 1980.

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